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May 20, 1997

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BY HAND DELIVERY

William Caton
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Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Re: ACSI's Petition for Declaratory Ruling Regarding
Preemption of the Arkansas Telecommunications
Regulatory Act of 1997 -- CC Docket No. 97-100

Dear Mr. Caton:

Please find enclosed for filing the original together with fifteen copies of the Reply Comments of Southwestern Bell Telephone Company. We are also sending one copy of these Reply Comments to Janice Myles, Common Carrier Bureau, and to ITS, Inc., as requested by the Commission in its Public Notice of April 3, 1997.

Please stamp and return the extra copy to the messenger.

Sincerely,


Michael K. Kellogg

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

American Communications Services, Inc.'s)
Petition for Declaratory Ruling Regarding)
Preemption of the Arkansas Telecom-)
munications Regulatory Reform Act of 1997)

CC Docket No. 97-100

REPLY COMMENTS
OF SOUTHWESTERN BELL TELEPHONE COMPANY

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Federal Communications Commission
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In the Matter of)
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American Communications Services, Inc.'s) CC Docket No. 97-100
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munications Regulatory Reform Act of 1997)

REPLY COMMENTS
OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company ("SWBT") hereby submits this reply to the comments filed in response to the petition of American Communications Services, Inc. ("ACSI").¹ As SWBT explained in its initial comments, the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") is consistent on its face with the federal Communications Act. Neither ACSI nor those who have filed comments in support of ACSI's petition have explained how the Arkansas Act actually has the effect of prohibiting any carrier from providing a telecommunications service, and none has suggested that the Arkansas Public Service Commission ("PSC") has failed to act in any way that would justify preempting its jurisdiction over interconnection agreements. Because those comments supporting ACSI's petition do little but duplicate the arguments made by ACSI, SWBT stands by its initial comments. However,

¹In addition to those filed by SWBT, comments were filed by Aliant Communications Co., the Arkansas Attorney General, the Arkansas Telephone Association, the Association for Local Telecommunications Services ("ALTS"), AT&T Corporation, MCI Telecommunications Corporation, Inc. ("MCI"), Northern Arkansas Telephone Co., Sprint Communications Co., L.P. ("Sprint"), and the Telecommunications Resellers Association ("TRA").

SWBT will take this opportunity briefly to address those few matters raised in the comment round that are new.

1. In its comments, Sprint purports to list a number of provisions of the Arkansas Act that are in conflict with this Commission's First Report and Order.² Upon examination, however, none of these alleged conflicts exist. For example, Sprint purports to find a conflict between section 9(d) of the Arkansas Act, which provides that "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale,"³ and this Commission's decision that the "substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions" ⁴ But where is the conflict? This Commission expressly recognized that "there may be reasonable restrictions on promotions and discounts"⁵ and deferred the determination of what those restrictions should be to the states. All the Arkansas General Assembly did was to provide that resale of such promotions and temporary discounts is "not required." Of course, Congress recognized that preemption might be appropriate if certain restrictions on resale were so onerous as to have the effect of prohibiting a company from providing a telecommunications

²First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶ 366 (Aug. 8, 1996) ("First Report and Order").

³Arkansas Act § 9(d). For a copy of the Arkansas Act, see Attachment D to SWBT's initial comments.

⁴First Report and Order, supra note 2, ¶ 952.

⁵Id.

service,⁶ but this is not an issue that can be resolved in the abstract. Neither ACSI nor Sprint has even attempted to demonstrate that the restrictions on resale contained in the Arkansas Act constitute barriers to entry.

Similarly, Sprint argues that this Commission's determination that restrictions on resale of volume discounts "should be considered presumptively unreasonable"⁷ somehow invalidates the Arkansas General Assembly's conclusion that the Arkansas PSC "shall approve, as permitted by the Federal Act, resale restrictions which prohibit resellers from . . . aggregating the usage of multiple customers on resold local exchange services, or any other reasonable limitation on resale to the extent permitted by the Federal Act."⁸ The Arkansas General Assembly obviously took pains to avoid any possibility that its Act would conflict with the requirements of federal law. Although this Commission reasoned that restrictions on resale of volume discounts often produce unjustified anticompetitive results, it did not suggest that that will always be the case.⁹ Therefore, as SWBT explained in its initial comments, ACSI's facial challenge must fail.¹⁰ The Commission will be presented with a genuine preemption issue under section 253 only if and when a company

⁶47 U.S.C. § 253(a), (d).

⁷First Report and Order, *supra* note 2, ¶ 953.

⁸Arkansas Act § 9(g) (emphasis added).

⁹First Report and Order, *supra* note 2, ¶ 953. The Arkansas PSC came to the same conclusion when it ruled recently in an arbitration proceeding between SWBT and AT&T that, with the exception of the cross-class restrictions explicitly authorized by section 251(c)(4)(B), all resale restrictions in Arkansas are presumptively unreasonable. See Order No. 6, In re AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, Docket No. 96-395-U, at 9-11 (filed Mar. 11, 1997).

¹⁰SWBT Comments at 14.

can prove that such restrictions have the effect of prohibiting it from providing a telecommunications service.

Together with TRA, Sprint repeats ACSI's assertion that the Arkansas Act prohibits the PSC from approving any negotiated agreement that provides for the unbundling of a network element that was not listed in the First Report and Order.¹¹ This is simply not so. As the Arkansas Attorney General has pointed out, the PSC recently ordered SWBT to make its "dark fiber" available as an unbundled element, even though this Commission did not include "dark fiber" among its minimum unbundling requirements.¹² This is a small example of the hazards of a facial challenge to a statute that is barely three months old; until the Arkansas PSC has had an opportunity to apply the Act in specific cases, it is impossible to substantiate strained arguments about how the Act will affect carriers' ability to provide telecommunications services.

Finally, Sprint argues that section 9(f) of the Arkansas Act is inconsistent with the requirement under section 251(c)(2) that incumbent local exchange carriers ("ILECs") provide interconnection "for the transmission and routing of telephone exchange service and exchange access"; Sprint asserts that it is also inconsistent with this Commission's conclusion that "parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2)."¹³ Section 9(f) provides that the Arkansas PSC's authority with respect to interconnection, resale, and unbundling is limited to the terms, conditions and agreements pursuant to which an ILEC "will provide interconnection, resale, or unbundling to a CLEC for the

¹¹See Sprint Comments at 4; TRA Comments at 10; ACSI Petition at 10-11.

¹²See Arkansas Attorney General Comments at 10.

¹³Sprint Comments at 7; First Report and Order, supra note 2, ¶ 185.

purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services to end-user customers.”¹⁴ Without any analysis, Sprint simply declares that “[t]he Arkansas Act would deny interconnection to CLECs seeking to serve IXC’s such as Sprint, in direct contravention of the Commission’s holding.”¹⁵ But Sprint’s interpretation of the Arkansas Act is entirely contrived: nothing on the face of the statute would prevent a CLEC seeking to provide access to the inter-exchange market from being treated as one “competing with the incumbent local exchange carrier in the provision of telecommunications services to end-user customers.” If the Arkansas PSC were to adopt Sprint’s reading of the Act in either approving or rejecting a particular agreement, Sprint could seek review of the PSC’s determination in federal district court under section 252(e)(6). But there can be no preemption under section 252(e)(5) unless and until the Arkansas PSC “fails to act.” Proving this, as SWBT explained in its initial comments, requires a detailed written petition, explaining how the State commission has failed to respond to a request for mediation or arbitration within a reasonable time.¹⁶ Neither ACSI nor Sprint has attempted such a showing or even raised this issue before the Arkansas PSC.

2. This Commission released its Report and Order governing universal service on May 8, establishing “support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health

¹⁴Arkansas Act § 9(f).

¹⁵Sprint Comments at 7.

¹⁶SWBT Comments at 14-16; see also First Report and Order, *supra* note 2, ¶ 1287.

care providers.”¹⁷ In this same Report and Order, the Commission recognized that “states may continue to have jurisdiction over implementing universal service mechanisms for intrastate services supplemental to the federal mechanisms so long as ‘the level of universal service provided by each state meets the minimum definition of universal service established [under section 254] and a State does not take any action inconsistent with the obligation for all telecommunications carriers to contribute to the preservation and advancement of universal service’ established under section 254.”¹⁸ In establishing the Arkansas Universal Service Fund (“AUSF”), the Arkansas General Assembly has done precisely what Congress and this Commission intended states to do. Now that the federal rules have been promulgated, the Arkansas PSC will establish state regulations governing precisely how the AUSF will be administered.¹⁹ Until it does so, however, any argument that Arkansas’s “regulations” are “inconsistent with the Commission’s rules”²⁰ is premature.

Nevertheless, AT&T parrots ACSI’s argument that the Arkansas Act’s universal service provisions should be preempted under section 253, never bothering to explain how these provisions have the effect of actually prohibiting anyone from providing a telecommunications

¹⁷Report and Order, In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 1 (May 8, 1997) (“Universal Service Order”).

¹⁸Id. ¶ 819 (quoting Joint Explanatory Statement of the Committee of Conference, S. CONF. REP. NO. 104-230, at 128 (1996)).

¹⁹Arkansas Act § 4(e) (providing that within 90 days of “the effective date of an FCC order pursuant to Section 254 of the Federal Act (47 USC 254), that approves, establishes or modifies interstate universal service funding,” the Arkansas PSC shall establish rules and procedures necessary to implement the AUSF).

²⁰47 U.S.C. § 254(f).

service.²¹ Instead, AT&T misquotes the statute: according to AT&T, the Commission should preempt the universal service provisions of the Arkansas Act because they “may have the effect’ of prohibiting carriers other than incumbent LECs from providing local service.”²² But Congress did not provide for the preemption of a state statute grounded on nothing but speculation. The statute, as this Commission knows well, provides that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²³ Congress clearly used the word “may” as a term connoting permission rather than possibility.

In addition to its general preemption argument, AT&T purports to identify specific areas of conflict between the universal service provisions of the Arkansas Act and the federal Communications Act. For example, AT&T suggests that the goal of the Arkansas Act’s universal service program is to provide an automatic revenue replacement mechanism for incumbent LECs whereas the purpose of the federal program is to provide affordable service in a competitively neutral way. Never mind that, according to the Act itself, the General Assembly established the AUSF “to promote and assure the availability of universal service at rates that are reasonable and affordable, and to provide for reasonably comparable services and rates between rural and urban areas”;²⁴ AT&T chooses instead to rely on an unpublished staff report as evidence of the true

²¹AT&T Comments at 2.

²²*Id.* at 5 (emphasis added).

²³47 U.S.C. § 253(a) (emphasis added).

²⁴Arkansas Act § 4(a).

meaning of the statute.²⁵ Even if it were true, however, that the Arkansas Act's purposes in establishing the AUSF were different from Congress's goals in establishing a federal universal service funding mechanism, the state law can be preempted only if it actually creates a barrier to entry or if the regulations implementing the Act are actually inconsistent with the Commission's rules. AT&T has failed to prove the existence of either of these necessary predicates.

Finally, AT&T alleges that the Arkansas Act is inconsistent with section 254(e), which provides that eligible telecommunications carriers must use their universal service support "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."²⁶ Section 5(b)(2) of the Arkansas Act provides that a telecommunications provider "may only receive funding for the portion of its facilities that it owns and maintains."²⁷ According to AT&T, "the Arkansas Act denies universal service support to new entrants that serve high cost areas through unbundled network elements, or facilities leased from a CAP or other CLEC, even though the serving carriers are bearing the costs of those facilities."²⁸ Without the benefit of any interpretive regulations from the Arkansas PSC, it is simply ridiculous for AT&T to assume that a conflict exists between the two statutory provisions. Needless to say, it is not self evident that the Arkansas Act's provision of support for the facilities that a telecommunications provider "owns or maintains" is in any way inconsistent with the federal Act's provision of support for the "maintenance . . . of facilities and services for which the support is intended." Once again, until

²⁵AT&T Comments at 4.

²⁶47 U.S.C. § 254(e); see AT&T Comments at 4-5 (incorrectly referring to section 254(d)).

²⁷Arkansas Act § 5(b)(2).

²⁸AT&T Comments at 5.

the Arkansas PSC has had an opportunity to establish regulations in light of this Commission's recent Report and Order, there is no way to know whether there is any inconsistency between the Arkansas universal service scheme and the federal program. The Commission should not accept AT&T's or ACSI's invitation casually to assume that the Arkansas PSC will promulgate regulations that either conflict with federal law or prohibit the provision of a telecommunications service.

CONCLUSION

For the foregoing reasons, and for the reasons discussed in its initial comments, SWBT requests that the FCC deny ACSI's petition for declaratory ruling.

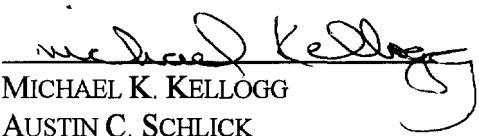
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May 20, 1997

CERTIFICATE OF SERVICE

I, Geoffrey M. Klineberg, hereby certify that on this 20th day of May, 1997, a true and correct copy of the foregoing Reply Comments of Southwestern Bell Telephone Company were served by hand or by first-class, United States mail, postage prepaid, upon each of the following:

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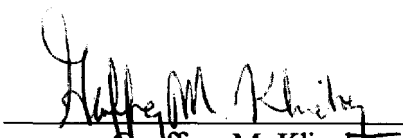
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